**CHAN CHI HUNG**

**v.**

**THE QUEEN**

COURT OF APPEAL, HONG KONG
LORD KEITH OF KINKEL, LORD MUSTILL, LORD LLOYD OF BERWICK,
LORD NICHOLLS OF BIRKENHEAD, LORD STEYN
[PRIVY COUNCIL APPEAL NO. 12 OF 1995]
26 JULY 1995

***STATUTORY INTERPRETATION:*** *Criminal law - Reformation of principle in statute after offence was committed but before plea - Whether accused liable for sentence under old law or amended statute - Art. 15.1 International Covenant on Civil and Political Rights - Art. 12(1) Hong Kong Bill Of Rights.*

On 18 May 1992, the appellant obtained from a jeweller a diamond ring by presenting a credit card which he knew to be forged. Later on the same day, the appellant was found by the police to be in possession of the ring, together with three forged credit cards (including the one which had been used to obtain the ring) and a blank embossed card which could be used to forge credit card advice slips. He also had with him a forged identity card. It was not disputed that the law in force made the possession of the forged cards and the blank embossed card offences under ss. 76(2) and 76A(1) of the Crimes Ordinance.

Section 76(2) made possession of the forged cards an offence punishable by imprisonment for 7 years whereas s. 76A(1) made the possession of the blank embossed card an offence punishable by imprisonment for 14 years.

On 26 June 1992, the Crimes (Amendment) Ordinance came into force repealing ss. 76(2) and 76A(1) and introduced the new ss. 75 and 76. Section 75(1) imposed a maximum of 14 years imprisonment for a person who has custody or control of a false instrument with intent to induce another to accept it as genuine whereas s. 75(2) made custody and control of a false instrument punishable by 3 year's imprisonment. Section 76(1) made it an offence to have custody or control of a machine or implement which has been specially designed or adapted for the making of any instrument with the intention to make it and use it to induce somebody to accept it as genuine and such an offence was punishable by imprisonment for 14 years. Section 76(2) made custody or control of such a machine or implement (referred in s. 76(1) ) an offence punishable by imprisonment for 3 years.

On 22 December 1992, the appellant pleaded guilty to, *inter alia*, two (2) charges of possessing forged dies and possessing an article fit and intended for use in the forgery of a document. He was sentenced to 3½ years for each charge to run concurrently. It was argued that the sentence was wrong as it exceeded by six (6) months the maxima applicable to each of the offences created by the new ss. 75(2) and s. 76(2) and that by Art. 12(1) of the Hong Kong Bill of Rights, sentences no greater than those permitted by the ss. 75(2) and 76(2) could be imposed. Art. 12(1) provided for the principle of non-retrospectivity and also provided as follows; "If subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby".

By a majority the Court of Appeal of Hong Kong dismissed the appeal and the appellant appealed to the Privy Council. It was argued that the old offences should be "traced" into the substituted new sections. Since ss. 75(1) and 76(1) call for specific intent not previously

required, the old offences would not fit into the new sections. The argument concluded that as such the Court had no choice but to fall back on the offences of simple possession under ss. 75(2) and 76(2) and pass sentence in accordance with the maximum attached i.e. 3 years.

**Held:**

**[1]** The new provisions are not a simple recapitulation of the old. There now exist two levels of gravity, attracting widely different maxima, and at least as a matter of wording the mental elements are not the same.

**[2]** The "tracing" argument is incorrect as it is applicable only when the new legislation is a simple reenactment of the old as otherwise the comparison of one category of offence with another will often be impossible. Further the effect would be to relieve the appellant from the increased burden of the new regime and to give him a benefit which in practice he would never have enjoyed.

**[3]** The question is therefore, not how the new definition of the offence corresponds with the old, but how the defendant would have stood if he had been convicted and sentenced for what he did under the new law rather than the old. The purpose of Art. 12(1) is plain i.e., to make sure that the criminal consequences of what someone has done must be judged according to the laws as it stood when he or she did it.

**[4]** The question therefore is, if the appellant had been convicted and sentenced under the new law on the day when he committed the offences, what range of sentences would have been open to the Court. For the first charge, it is plain that the new s. 75(1) would be the appropriate choice for the intention of the appellant to use the forged credit cards to induce somebody to accept them as genuine could be demonstrated by the fact that he used one of the cards to defraud the shopkeeper of the diamond ring. The same reasoning in relation to the 2nd charge. In each case, the maximum sentence was 14 years and it would have made no difference if the appellant's guilty conduct had taken place two months later than it did, and he has suffered no injustice thereby.

*[Appeal dismissed].*

**Case referred to:**
*R. v. Faisal [1993] 3 HKPLR 220* ***(refd)***

**Legislation referred to:**
Bill of Rights Ordinance, Cap. 383, Art. 12(1)
Crimes (Amendment) Ordinance s. 75, 76
Crimes Ordinance, Cap. 200, ss. 76(2), 76A(1)

**Other sources referred to:**
International Covenant on Civil and Political Rights, Article 15.1

**JUDGMENT**

**Lord Mustill:**

Retrospective criminal laws are odious to most developed legal systems. Article 15.1 of the International Covenant on Civil and Political Rights leaves the principle in no doubt:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable

when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

Hong Kong has been in the forefront of those territories which, amongst the 129 signatories of the International Covenant, have chosen to incorporate it bodily into their legislation. Aside from the substitution of "Hong Kong" for "national" in the first sentence, Article 12(1) of the Hong Kong Bill of Rights, which forms Part II of the Bill of Rights Ordinance, Cap. 383., exactly reproduces Article 15.1 of the Covenant. The present appeal is brought to resolve a conflict of opinion in the courts of Hong Kong, not about the general principle of Article 12(1), which is undisputed, but as to the way the third sentence should be applied when the relevant statute is reformulated between the occurrence of the criminal acts or omissions in question and the time when penal sanctions are imposed.

The appeal turns on three dates. The first is 18 May 1992, when the appellant, Chan Chi-Hung, obtained from a jeweller a diamond ring by presenting a credit card which he knew to be forged. Later on the same day the appellant was found by the police to be in possession of the ring, together with three forged credit cards, including the one which had been used to obtain the ring, and a blank embossed card which could be used to forge credit card advice slips. In addition, the appellant had with him a forged identity card. It is not in dispute that under the law then in force the possession of the forged cards and the possession of the blank embossed card were offences against, respectively, s. 76(2) and s. 76A(1) of the Crimes Ordinance, Cap. 200. These were in the following terms:

76(2) Any person who, without lawful authority or excuse and knowing the same to be forged, has in his custody or possession any forged seal or die the forgery of which with intent to defraud or deceive is made punishable by s. 73 shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 7 years.

76A(1) Any person who has in his custody or possession any document, equipment or article fit and intended for use in the forgery of any document or other thing commits an offence and is liable on conviction on indictment to imprisonment for 14 years.

It is convenient to call these provisions "the old s. 76(2)" and "the old s. 76A(1)".

The next relevant date is 26 June 1992, when there came into force the Crimes (Amendment) Ordinance. This repealed the old ss. 76(2) and 76A(1), and introduced the following provisions ("the new s. 75" and "the new s. 76"):

75(1) A person who has in his custody or under his control an instrument which is, and which he knows or believes to be, false, with the intention that he or another shall use it to induce somebody to accept it as genuine, and by reason of so accepting it to do or not do some act to his own or any other person's prejudice, commits an offence and is liable on conviction on indictment to imprisonment for 14 years.

(2) A person who, without lawful authority or excuse, has in his custody or under his control an instrument which is, and which he knows to be, false, commits an offence and is liable on conviction on indictment to imprisonment for 3 years.

76(1) A person who makes or has in his custody or under his control a machine or implement, or any paper or other material, which to his knowledge is or has been specially designed or adapted for the making of any instrument, with the intention that he or another shall make a false instrument and that he or another shall use

that false instrument to induce somebody to accept it as genuine and by reason of so accepting it to do or not do some act to his own or any other person's prejudice, commits an offence and is liable on conviction on indictment to imprisonment for 14 years.

(2) A person who, without lawful authority or excuse, makes or has in his custody or under his control a machine or implement, or any paper or other material, which to his knowledge is or has been specially designed or adapted for the making of any false instrument, commits an offence and is liable on conviction on indictment to imprisonment for 3 years.

Without entering to detail it can be seen that the new regime is not a simple recapitulation of the old. There now exist two levels of gravity, attracting widely different maxima, and at least as a matter of wording the provisions concerning the mental elements of the offences are not the same.

The third date was 22 December 1992, when the appellant appeared in the District Court and pleaded guilty to four out of six charges arising from the events of 18 May, two other charges not being pursued. On two of the active charges (charges 4 and 6) which related to the identity card and the fraudulent obtaining of the ring, the district Judge imposed sentences of fifteen months and eighteen months' imprisonment respectively. Understandably, there was no appeal against these sentences. The present controversy arises from the first two charges, which were framed as follows:

**1st Charge**

**Statement of Offence**

Possessing forged dies, contrary to s. 76(2) of the Crimes Ordinance, Cap. 210. [*sic*]

**Particulars of Offence**

Chan Chi-hung, on 18 May, 1992, in Hong Kong, had in his custody or possession forged dies, namely a forged Hong Kong and Shanghai Bank Visa card number 4966-0400-9379 in the name of Ng Kin Keung, a forged Hong Kong and Shanghai Bank Visa card number 4966-0400-0046-9379 in the name of Chung Hoa Nung, and a forged Chase Manhattan Bank Visa card number 4563-7730-0019-6850 in the name of Lee Hok Kan, being forgeries of seals provided, made or used by Visa International for the purpose of its affairs, knowing the same to be forged.

**2nd Charge**

**Statement of Offence**

Possessing an article fit and intended for use in the forgery of a document, contrary to s. 76A of the Crimes Ordinance, Cap. 200.

**Particulars of Offence**

Chan Chi-hung, on 18 May, 1992, in Hong Kong, had in his custody or possession an article fit and intended for use in the forgery of credit sales advice slips, namely an embossed card bearing the number 5193-4232-1989-2726.

(The reference number of one card was incorrectly stated but nothing turns on this).

In relation to the pleas on each of these charges the district Judges sentenced the appellant to terms of 3½ years imprisonment. The sentence of eighteen months imposed on charge 6 was expressed to be consecutive to those imposed concurrently on the first two charges,

making a total of five years, to begin after the expiry of a previous sentence for distinct though similar offences. It will be seen that the sentences of 3½ years imposed on the first two charges were well within the maxima stipulated for the offences with which, under the law as it then stood, the defendant was properly charged. These maxima were 7 years and 14 years imprisonment respectively. There was no breach of the principle, called in aid by Counsel for the appellant, that a defendant who pleads guilty to an offence should be sentenced in a manner appropriate to that offence and not to another of which he might on the facts have been convicted. The real complaint is that although the sentences imposed were within the maxima of 14 years stipulated by the new ss. 75(1) and 76(1) they exceeded by six months the maxima applicable to each of the offences created by the new ss. 75(2) and 76(2).

On appeal to the Court of Appeal of Hong Kong the appellant, in addition to another ground which is no longer material, maintained that the district Judge was obliged by Article 12(1) to impose sentences no greater than those permitted by the new ss. 75(2) and 76(2). By a majority the Court of Appeal dismissed this argument; MacDougall V.P. dissented only because he regarded the Court as constrained to the opposite conclusion by the previous decision of the Court in *R. v. Faisal* [1993] 3 HKPLR 220. By special leave the appellant now appeals to this Board.

Since the appeal in the present case, like the proceedings before the Court of Appeal in Hong Kong, is concerned with the principle and not with the level of the sentences imposed, and since in any event it is only in an exceptional case that this Board will entertain an appeal against sentence, their Lordships need do no more than note that the district Judge very properly had regard, when fixing the sentences, not only to the appellant's pleas of guilty but also to the principle of totality. If, in the operation of this principle, the sentences for the credit card offences had been rather less, and the sentence for defrauding the jeweller of the ring had been rather more, yielding the same total sentence of five years' imprisonment as was actually imposed, there could have been no ground for complaint. In the event however, the distribution of sentences has raised an issue of principle; it is important and their Lordships must deal with it. When doing so they have naturally paid careful regard to the reasoning expressed not only in the judgment under appeal but also in the previous judgments, some ten in number, where with differing outcomes the Court of Appeal of Hong Kong has grappled with this rather elusive question. All the judgments were properly examined in some depth during the argument of this appeal. The Board intends no discourtesy to the courts of Hong Kong in not following the same path here. Once all the material considerations have been grasped, it is a question of preferring one interpretation to another, and the judgments under review, helpful as it has been to study them, do not go beyond the submissions advanced before the Board.

Their Lordships therefore turn at once to the third sentence of Article 12(1). Although no travaux preparatoires have been brought forward, it is likely that the framers of the Covenant had principally in mind the simple situation in which the defendant is convicted of a charge which remains unchanged when he comes forward for sentence, but which by then has been given lesser penal consequences. In such a case there are no problems; nor where the law existing at the time when the criminal conduct took place has been repealed and replaced by another creating an identical offence but with a lesser penalty. What perhaps the signatories of the Covenant may not have contemplated in their deliberations on the third sentence is the situation where through changes in the law conduct which was criminal at the time either ceases to be criminal at all, or falls to be assessed within the framework of a reformulated system which has no exact counterpart in the former law. As to the first of these cases

perhaps logic demands that since the law no longer makes any provision for the offence the conviction should stand but should not be visited with any penalty. Yet this solution sits awkwardly with the first sentence of Article 12(1). Their Lordships think it better to leave this problem until the time, if ever, when it arises in practice, and to concentrate on the situation where the relevant part of the criminal law is recast in a manner which gives a new formal recognition to degrees of culpability so that the old law is no longer reflected directly in the new.

Focusing on this question, their Lordships are required to choose between two essentially different understandings of the word "offence" in the third sentence of Article 12(1).

The first looks to the various labelled categories of conduct endowed by domestic law with criminal character and penal consequences. In this sense one speaks of the criminal offence of murder. It exists, in the abstract, in the statutes and decided cases independently of the commission of any actual murders. In a very compressed form the argument runs as follows. The first step is to identify from the charge sheet, indictment or similar document the category of conduct, declared by the law to be a particular offence, to which the prosecuting authority seeks to assign the conduct of the defendant. The next step is to identify the elements of the conduct which define the old category of offence with which the defendant is charged, and to search among the new categories for one whose elements correspond substantially with those of the old category. That is to say, the elements of the old offence, but no more, must be sufficient to satisfy the requirements of the new offence, the qualification "but no more" being crucial. When this equivalent new category is found the penalties attaching to it are compared with those of the old category, and the defendant is entitled to be sentenced by reference to whichever is the less severe. Finally, applying this method to the present case one finds the appellant charged under statutory provisions which make no reference to the intent of the person in possession of the "dies" and "articles", as distinct from the intent of the person who brought them into existence. Tracing these offences into the substituted new sections it is found that the aggravated offences under ss. 75(1) and 76(1) will not fit, because they call for a specific intent which was not previously required. Hence, the argument concludes, the Court had no choice but to fall back on the offences of simple possession under ss. 75(2) and 76(2), and pass sentence in accordance with the maxima attached to them.

Their Lordships have expressed the argument in this rather ungainly way, by reference to labelled categories of conduct, in order to emphasise the essentially abstract nature of the enquiry which it involves. The Court is required simply to look at the definitions of the old and the new offences on the printed page, examining the types of conduct which are capable of falling within them, without reference to the conduct of the defendant which actually made him guilty of the old offence. Adopting this approach in the present case, Mr. McCoy, for the appellant, set out to trace the old s. 76(2), under which the appellant was charged in relation to the three forged credit cards, into subsection (2), rather than sub-section (1), of the new s. 75; and to trace the old s. 76(A), under which the appellant was charged in relation to the blank embossed card, into subsection (2) rather than sub-section (1) of the new s. 76. If successful, this process would establish the second sub-sections of each new section as corresponding to the relevant old offence, and since each carries a maximum sentence of three years' imprisonment that was the most which the appellant could properly have been required to serve.

This argument, forcefully presented before the Board, has an immediate appeal, for at first sight it seems to reflect both the wording and the intent of the third sentence. On closer examination, however, their Lordships believe it to be incorrect.

In the first place there are two serious practical objections to the appellant's reading of Article 12. The first is that, except where the new legislation is a simple re-enactment of the old, the comparison of one category of offence with another will often be impossible. Even if one adds the revealing qualification, as did the argument for the appellant, that the correspondence between the old and the new law need be no more than "substantial", where a particular branch of the criminal law has been radically restructured there may be no provision of the new scheme which corresponds with any part of the old. In such a case the Court would be obliged either to opt for the most lenient feature of the new regime - a recourse which is supported neither by the logic nor the aim of Article 12 - or to look behind the category to the actual facts, which is precisely the method which the appellant's argument is at pains to repudiate. In the light of the close examination of the legislation conducted in argument, their Lordships suspect that the present is indeed one of those cases where a sufficiently corresponding category of offence cannot be found. But they need not explore this, in the light of the conclusion hereafter expressed.

Secondly, as the present case shows, the interpretation for which the appellant contends is capable in practice of an outcome far more favourable to an offender than the policy of Article 12, and of the Covenant on which it is founded, can reasonably be supposed to sustain. The appellant was fortunate to have committed his offence when he did, rather than two months later, when his activities would undoubtedly have founded a charge under the new s. 75(1), with a maximum sentence of 14 years' imprisonment. This is not in itself an objection, since the principle of non-retrospectivity will inevitably mean that the penal treatment of some offenders depends on accidents of timing, and a degree of anomaly must be tolerated in order to keep the principle intact. But cases like the present go much further, since the effect would at the same time be to relieve the appellant from the increased burden of the new regime and to give him a benefit under the new regime which in practice he would never have enjoyed; to spare him from the increase in maximum penalty from 7 to 14 years' imprisonment which his criminal conduct would have attracted and to substitute a maximum of 3 years imprisonment, a term which in the context of the revised regime was insufficient to reflect the criminality of what he actually did.

Nevertheless, if the comparative approach advocated for the appellant had clearly reflected the intent of the third sentence, it would have been necessary to tolerate some degree of practical anomaly in order not to undermine the important principle which on any view of its precise meaning Article 12 is clearly intended to embody. Their Lordships do not, however, consider that this is so, once the third sentence is viewed in the context of Article 12(1) as a whole. It is convenient to set this out again, for ease of reference separating the three sentences:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under Hong Kong or international law, at the time when it was committed.
>
> Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.
>
> If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

Starting with the first sentence, it is quite clear that this poses no abstract questions about offences in the general. Attention is directed to what the individual person actually did or omitted to do, and his actual conduct is measured against the elements required to constitute

whatever offence might be relevant. Equally, when one turns to the second sentence, it is plain that the reference is not to a category of acts and omissions decreed by the law to have a criminal character, but to the particular acts and omissions for which the particular defendant is held to be criminally accountable. Given that the first two sentences have this focus on what the defendant actually did, the third sentence would, according to traditional common law methods of interpretation, be assumed to have a similar focus. The question would be, not how the new definition of the offence corresponds with the old, but how the defendant would have stood if he had been convicted and sentenced for what he did under the new law rather than the old.

Their Lordships have referred to the traditional common law methods of interpretation in acknowledgement that the Covenant springs from a consensus of nations, many of whose legal systems adopt a less linguistic and analytical approach to the interpretation of instruments than is taken for granted in countries whose systems originate in the common law. In the event, their Lordships doubt whether, once the problem is recognised, it makes any difference to the present case which philosophy of interpretation is chosen, but it is right as a precaution to adopt a broad approach by testing the apparent meaning of the words against the purpose which they are intended to fulfil. Quite often the benefits of a "purposive" approach are illusory, since the purpose which is used as a point of reference merely reflects the contention of one or other of the parties about what the words ought to mean. But here the purpose of s. 12(1) is plain; namely, to make sure that the criminal consequences of what someone has done must be judged according to the law as it stood when he or she did it. This is a practical standard directed, as are all the provisions of the Bill of Rights, to the situation of the individual. When applying this standard it appears to their Lordships out of place to engage in a technical and essentially legalistic exercise of comparing in the abstract the requirements of one statutory definition with another.

Thus, in their Lordships' opinion, the considerations of policy, practicality and language all point to a question in the following terms: if the appellant had been convicted and sentenced under the new law on the day when he committed the offences what range of sentences would have been open to the Court? So far as the events underlying charge 1 are concerned the new s. 75 would have offered two alternatives, the choice depending upon the intention of the offender. On the agreed facts it is plain that s. 75(1) rather than s. 75(2) would have been the appropriate choice, for the intention of the appellant to use the forged credit cards to induce somebody to accept them as genuine could hardly be more clearly demonstrated than by the fact that this is exactly what he had done, only a short time before, when he used one of the cards to defraud the shopkeeper of the diamond ring. The same inference is, their Lordships consider, legitimate in relation to the second charge. In each case the maximum sentence would have been 14 years' imprisonment rather than the 7 and 14 years which the sentencing (by basing his decision on sentencing levels established by cases antedating the change in the law) had plainly assumed to be appropriate. It would have made no difference if the appellant's guilty conduct had taken place two months later than it did, and he has suffered no injustice thereby.

Accordingly, for reasons which although differently expressed are substantially in accordance with those given by the Court of Appeal of Hong Kong, their Lordships will humbly advise Her Majesty that this appeal should be dismissed. Since the Attorney General has acknowledged that this appeal was pursued at his instance to resolve the conflict of opinion in the courts of Hong Kong it is appropriate that, exceptionally, the respondent should bear all the costs of the appeal before their Lordships' Board.